

² The Board notes that following the March 30, 2020 decision, OWCP received additional evidence. However, the Board’s *Rules of Procedure* provides: “The Board’s review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal.” 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

ISSUES

The issues are: (1) whether appellant received an overpayment of compensation in the amount of \$6,327.53 for the period September 30 through November 9, 2019 for which he was at fault, because he continued to receive wage-loss compensation following his return to full-time limited-duty work; and (2) whether OWCP properly found that appellant was at fault in the creation of the overpayment, thereby precluding waiver of recovery of the overpayment.

FACTUAL HISTORY

On May 13, 2018 appellant, then a 29-year-old homeland security investigations special agent, filed a traumatic injury claim (Form CA-1) alleging that on April 13, 2018 he injured his left knee and left shoulder during a training exercise while in the performance of duty. OWCP accepted the claim for left shoulder impingement syndrome and left knee internal derangement. It paid appellant wage-loss compensation on the supplemental rolls as of June 29, 2018 and on the periodic rolls from September 14, 2018 to March 2, 2019. OWCP again paid him wage-loss compensation on the supplemental rolls from March 3 through September 14, 2019 and on the periodic rolls from September 15 to November 9, 2019.

In progress notes dated August 27, 2019, Dr. Veerinder S. Anand, a Board-certified orthopedic surgeon, noted appellant's April 13, 2018 employment injury and provided physical examination findings. He diagnosed acute left shoulder and knee pain, left shoulder impingement syndrome, and left knee internal derangement, which he attributed to the work injury. Dr. Anand found appellant disabled from work and indicated that he would begin physical therapy. In a work status report of even date, Dr. Anand held appellant off work until October 8, 2019.

In a September 12, 2019 report, Greg Lewis, a field nurse, noted that appellant's care had been transferred from California to Virginia, that his last medical appointment had been August 27, 2019, and that appellant had an estimated return to work date of October 8, 2019.

In an October 7, 2019 report, Dr. Robert H. Schnarrs, a Board-certified plastic surgeon, diagnosed left shoulder impingement syndrome and left knee derangement. Physical examination findings included limited left shoulder elevation with otherwise normal range of motion. He released appellant to return to full-time modified work that day. In an attached form report of even date, Dr. Schnarrs noted that appellant could return to work on October 7, 2019 with restrictions of limited use of his right upper extremity.

In an undated letter received by OWCP on November 12, 2019, appellant indicated that he had been unable to contact his new claims examiner, but he wanted to advise that he had returned to light-duty work. He requested that OWCP stop making automatic payments.

A memorandum of telephone call (Form CA-110) dated November 20, 2019 indicated that a payroll technician from the employing establishment stated that appellant returned to "regular pay" on September 30, 2019.

The record contains a November 20, 2019 compensation termination worksheet calculating appellant's overpayment of compensation for the period September 30 through November 9, 2019.

On February 26, 2020 OWCP advised appellant of its preliminary determination that he had received an overpayment of compensation in the amount of \$6,327.53 for the period September 30 through November 9, 2019 because he returned to full-time employment on September 30, 2019, but continued to receive wage-loss compensation for total disability through November 9, 2019. It further notified him of its preliminary determination that he was at fault in the creation of the overpayment because he accepted a payment that he knew or reasonably should have known was incorrect. Additionally, OWCP provided appellant with an overpayment action request form and informed him that within 30 days he could request a telephonic conference, a final decision based on the written evidence, or a prerecoumpment hearing. It requested that he complete an enclosed overpayment recovery questionnaire (Form OWCP-20) and submit supporting financial documentation.

A March 18, 2020 Form CA-110 indicated that appellant contacted OWCP to find out whether he could return the money he received after he returned to work. OWCP stated that he could and explained the different ways he could provide a payment. Appellant additionally stated that the amount of overpayment was incorrect because he returned to work in October 2019 rather than on September 30, 2019. OWCP informed him that the employing establishment had related that appellant returned to work on September 30, 2019, and it advised that he would have to provide evidence by March 26, 2020 from the employing establishment, which established a different return to work date. No additional evidence was received.

By decision dated March 30, 2020, OWCP finalized its preliminary determination that appellant had received an overpayment of compensation in the amount of \$6,327.53 for the period September 30 through November 9, 2019, as he returned to work on September 30, 2019, but continued to receive wage-loss compensation for total disability through November 9, 2019. It found that no response was received to the preliminary overpayment determination, and it determined that he was at fault in the creation of the overpayment because he received a compensation payment deposited by electronic funds transfer (EFT) over 30 days ago, allowing for ample time for him to receive and review a statement from his financial institution showing the details of the improper payment. OWCP additionally found that appellant should have known that the payment was incorrect because the dates overlapped with the period he was working. It determined that he should forward \$6,327.53 within 30 days to repay the overpayment of compensation.

LEGAL PRECEDENT -- ISSUE 1

Section 8102(a) of FECA provides that the United States shall pay compensation for the disability or death of an employee resulting from personal injury sustained while in the performance of duty.³ Section 8129(a) of FECA provides, in pertinent part, that when an overpayment has been made to an individual under this subchapter because of an error of fact or law, adjustment shall be made under regulations prescribed by the Secretary of Labor by decreasing later payments to which an individual is entitled.⁴ A claimant is not entitled to receive

³ *Supra* note 1 at § 8102(a).

⁴ *Id.* at § 8129(a).

disability benefits and actual earnings for the same time period.⁵ OWCP procedures provide that an overpayment of compensation is created when a claimant returns to work, but continues to receive wage-loss compensation.⁶

ANALYSIS -- ISSUE 1

The Board finds that fact of overpayment has been established.

OWCP continued to pay appellant wage-loss compensation for disability through November 9, 2019, after he had returned to work. As noted above, a claimant is not entitled to receive compensation for disability during a period in which he had actual earnings.⁷ Therefore, an overpayment of compensation was created in this case.

The Board further finds, however, that this case is not in posture for decision with regard to the amount of the overpayment. In the February 26, 2020 preliminary notice, OWCP determined the overpayment of compensation to be \$6,327.53 for the period September 30 through November 9, 2019 because OWCP continued to pay appellant wage-loss compensation for disability after he returned to work on September 30, 2019. However, the note from a field nurse dated September 12, 2019 indicated an estimated return to work date of October 8, 2019, the August 27, 2019 reports from Dr. Anand related that appellant would remain disabled until October 8, 2019, and the October 7, 2019 reports from Dr. Schnarrs released appellant to modified work effective October 7, 2019.

OWCP did not adequately explain the amount of the overpayment in this case, as it found an overpayment beginning September 30, 2019 despite the evidence of record demonstrating that appellant returned to full-time limited-duty work on or about October 8, 2019. A claimant is entitled to an overpayment decision that clearly explains how the amount was calculated.⁸ The Board, therefore, finds that OWCP has not established the period and amount of the overpayment in question.

⁵ See *M.C.*, Docket No. 19-1263 (issued March 5, 2020); *K.K.*, Docket No. 19-0978 (issued October 21, 2019); *K.E.*, Docket No. 18-0687 (issued October 25, 2018); *M.S.*, Docket No. 16-0289 (issued April 21, 2016); *L.S.*, 59 ECAB 350, 352-53 (2008).

⁶ *L.C.*, Docket No. 20-1058 (issued June 21, 2021); *A.H.*, Docket No. 20-0442 (issued January 26, 2021); *L.H.*, Docket No. 20-0115 (issued September 4, 2020); *C.A.*, Docket No. 18-0092 (issued April 2, 2018); *Danny E. Haley*, 56 ECAB 393 (2005); Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Action*, Chapter 6.200.1 (September 2018).

⁷ *Id.*

⁸ See *L.C.*, *supra* note 6; *M.M.*, Docket No. 17-0560 (issued August 23, 2017); *R.H.*, Docket No. 08-2025 (issued July 20, 2009); see also *O.R.*, 59 ECAB 432 (2008).

The case will be remanded to OWCP for recalculation of the period and amount of the overpayment, to be followed by a new preliminary determination of overpayment and a *de novo* overpayment decision.⁹

CONCLUSION

The Board finds that OWCP properly determined that an overpayment of compensation was created. The Board further finds, however, that the case is not in posture for decision regarding the period and amount of the overpayment.¹⁰

ORDER

IT IS HEREBY ORDERED THAT the March 30, 2020 decision of the Office of Workers' Compensation Programs is affirmed in part and set aside in part and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: September 29, 2021
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board

⁹ See *L.C.*, *supra* note 6; *L.H.*, *supra* note 6.

¹⁰ In light of the Board's disposition of Issue 1, Issue 2 is rendered moot.